Petition

81-1189

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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1981

BERNARD THOMAS BLACKWELL,
Petitioner

-vs-

CHARLES ANDERSON, Warden,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
Court of Appeals No. 81-1274

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STATEMENT OF QUESTION PRESENTED

Where under state law a specific intent to kill is an element of the crime of first degree murder, is a conviction for first degree murder constitutionally infirm where the trial court instructed the jury in effect that they might convict if they found that the defendant had a specific intent to kill *or* that he created a high risk of death with knowledge that death might ensue?

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Constitutional Provision:

14th Amend, US Constit 1

Other:

28 USC 1254 1

JURISDICTION OF THE COURT

The Opinion of the Court of Appeals sought to be reviewed is dated November 23, 1981 and it was filed on November 23, 1981.

Jurisdiction to review said Opinion is conferred, it is believed, upon this Court by *28 USC 1254*.

CONSTITUTIONAL PROVISION INVOLVED

Amendment 14, United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case originated in the Recorder's Court for the City of Detroit, Michigan, a court of criminal jurisdiction of felonies and misdemeanors committed within the City of Detroit.

Petitioner was charged in a two count information with premeditated murder of the first degree in the shooting death of one Charles Thompson and with possession of a firearm in the commission of a felony.

The case was tried to a jury.

One of the alleged participants testified that he and the petitioner and one Pippin went to the apartment of the deceased, the petitioner saying 'We are going to get Charles, he got some money'. Petitioner kicked the door of

the apartment three times and it flew open and the deceased was standing there with a stick or a pipe in his hand. Pippin shot the deceased three times; petitioner was 'down by the stairs' while the three shots were fired. While going down the stairs, petitioner said to Pippin 'Make sure he dead'. Pippin went back toward the apartment and the witness heard three shots. In the car, petitioner asked 'is he dead' and Pippin answered 'yes, he is dead' (Trial Transcript, pp 84-96).

In his charge to the jury, the trial judge defined the elements of murder of the first degree. The critical part of the charge is the following:

> 'Fourth, for murder, you must indicate that the principal acted wilfully, consciously and knowingly in performing the act which caused death. The principal must have either intended to kill, that is, he must have done the act intending that it result in death or in great and serious bodily injury or he must have knowingly created a very high degree of risk with knowledge that it probably would cause death.
>
> 'For murder in the first degree, the Prosecutor must prove the four elements of second degree murder which I have just gone through with you and in addition he must prove beyond a reasonable doubt that the fifth element which raises the crime to first degree murder, and the fifth element is as follows, that the death was the result of a premeditated, deliberate intent to kill.
>
> 'Now, what do we mean by premeditation? Premeditated means that the person thought about the act beforehand or designed or planned the act. That is, that he contemplated the act and that it was done—not done—excuse me, on the spur of the moment.
>
> 'Wilful means intentional.' (Trial Trans p 309)

Petitioner rested without adducing any evidence whatever.

The jury convicted petitioner of murder of the first degree and of possession of a firearm in the commission of a felony.

Petitioner was sentenced to life imprisonment with no hope of parole on the murder conviction and to a consecutive term of two years on the firearm conviction.

Petitioner appealed his convictions as a matter of right to the Michigan Court of Appeals and his convictions were affirmed by that Court. Petitioner's application for leave to appeal to the Michigan Supreme Court was denied.

Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan, Southern Division, and this petition was denied. Petitioner appealed this denial to the United States Court of Appeals for the Sixth Circuit and that Court affirmed the denial of the habeas corpus petition.

ARGUMENT

In *People* v *Garcia*, 398 Mich 250, 259 (1976), the Michigan Supreme Court made it clear that first degree premeditated murder was a specific intent crime:

> '[W]e hold that nonfelony first-degree murder is a specific intent crime requiring an intention to take life.
>
> 'Our holding is supported by the language of the first-degree murder statute.
>
> ' "All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing * * * shall be murder of the first degree." MCLA 750.316; MSA 28.548.
>
> 'A reading of the statute mandates the construction that "wilful * * * killing" means the intent to accomplish the result of death.'

In *People* v *Milton*, 81 Mich App 515, 518 (1978), the Michigan Court of Appeals reversed the conviction for first degree murder and ordered a new trial where the trial judge gave a jury instruction virtually identical to the one given in the case at bar:

> 'The trial judge in his charge authorized the jury to convict the defendant of first-degree murder if he "either intended to kill the deceased or that he consciously created a very high degree of risk of death to another with knowledge of its probable consequences". This is not the law. [Citations omitted.] Mere conscious indifference to the likelihood of death as a result of a person's intentional act is not enough; to commit first-degree murder, a person must act with the purpose of causing death. *People* v *Garcia*, 398 Mich 250, 259 (1976).'

On application of the prosecutor, the Michigan Supreme Court affirmed the reversal in *People* v *Milton, supra*, but directed instead of a new trial the entry of judgment of conviction for murder of the second degree and re-sentence. *People* v *Milton*, 403 Mich 821 (1978).

The case at bar is indistinguishable from *People* v *Milton, supra*. There is no apparent reason why petitioner should not be accorded the same relief accorded the defendant in *People* v *Milton, supra*.

Petitioner's contention in the United States Court of Appeals was that, the jury having been given a choice of finding that petitioner had either an intent to kill or had consciously created a high risk of death knowing that death would probably result, and being the sole determiners of the facts, *People* v *Chamblis*, 395 Mich 408 (1975), might have found that petitioner did not have an intent to kill but did consciously create a high risk of death.

In which case, petitioner was convicted of first degree murder without the prosecution's having proven beyond a

reasonable doubt every fact necessary to constitute the crime charged. *In re Winship*, 397 US 358 (1970).

A long line of Michigan cases hold that when a trial judge gives a correct and an incorrect instruction on a point of law, it will be presumed that the jury has followed the incorrect instruction. *People* v *Eggleston*, 186 Mich 510 (1915); *People* v *Vanderhoof*, 234 Mich 419 (1926); *People* v *Kanar*, 314 Mich 242 (1946); *People* v *Clark*, 340 Mich 411 (1954).

CONCLUSION

Thus, it can be seen that petitioner was deprived of his right to due process under the 14th Amendment to the United States Constitution.

RELIEF SOUGHT

Petitioner respectfully prays this Court issue its Writ of Certiorari to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,
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December 15, 1981

APPENDIX

No. 81-1274

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BERNARD THOMAS BLACKWELL,
Petitioner-Appellant,

v.

CHARLES ANDERSON, Warden,
Respondent-Appellee.

APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed November 23, 1981.

Before: EDWARDS, Chief Circuit Judge, KENNEDY, Circuit Judge and CECIL, Senior Circuit Judge.

PER CURIAM. Petitioner in this case appeals from a judgment denying his habeas corpus petition filed under 28 U.S.C. § 2254 (1976). Petitioner had been convicted of first degree murder and possessing a firearm during the commission of a felony. He seems to contend that at best the proofs presented by the government at his trial would serve to sustain a conviction for second degree murder.

Our review of this record, however, shows that there is more than ample evidence for the jury to find the following facts. On the date in question defendant went to the apartment of one Charles Thompson at 3 a.m. with three other men. Defendant kicked the door in. One of the other men, Pippin, shot Thompson three times. Defendant then told Pippin, the man who had shot Thompson, to make sure that

Thompson was dead. Thereupon Pippin went back and shot Thompson three more times.

We believe that the jury could appropriately have found the necessary intent and participation in this murder to support the first degree murder conviction. Further, we find in this record no prosecutorial abuse, ineffective assistance of counsel, or erroneous ruling by the trial judge which served to deprive appellant of any federal constitutional right.

The judgment of the District Court is therefore affirmed.

Opposition

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v

CHARLES ANDERSON, WARDEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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STATEMENT OF QUESTION

WHERE THE STATE COURT JURY WAS CORRECTLY INSTRUCTED THAT DEFENDANT COULD BE CONVICTED OF SECOND DEGREE MURDER IF HE EITHER INTENDED TO KILL OR KNOWINGLY CREATED A VERY HIGH DEGREE OF RISK WITH THE KNOWLEDGE THAT IT PROBABLY WOULD CAUSE DEATH, BUT WAS ALSO SPECIFICALLY INSTRUCTED THAT HE COULD BE CONVICTED OF FIRST DEGREE MURDER ONLY IF HE HAD A "PREMEDITATED, DELIBERATE INTENT TO KILL", DID THE INSTRUCTIONS UNCONSTITUTIONALLY RELIEVE THE PROSECUTION OF THE BURDEN, UNDER STATE LAW, OF PROVING THE SPECIFIC INTENT TO KILL?

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The *per curiam* decision of the Court of Appeals affirming the District Court's denial of a petition for writ of habeas corpus was filed November 23, 1981. *Blackwell* v *Anderson, Warden,* .... F2d .... (CA 6, No. 81-1274, 11/23/81). The District Court's unreported Memorandum Opinion and Order were entered December 4, 1980.

Petitioner was convicted by a state court jury of murder in the first degree and possession of a firearm in the commission or attempted commission of a felony. In an unreported memorandum opinion the Michigan Court of Appeals summarily reversed the felony-firearm conviction, but affirmed the first degree murder conviction, saying in pertinent part, *People* v *Blackwell,* Michigan Court of Appeals Docket No. 78-1541 (January 23, 1979):

"A careful review of the transcript and the four allegations of error presented for our consideration discloses no reversible error. Defendant's conviction for first-degree murder is affirmed."

The Michigan Supreme Court denied leave to appeal without opinion. *People* v *Blackwell*, 407 Mich 851 (August 28, 1979), *recon den* November 1, 1979.

JURISDICTION

Respondent accepts Petitioner's statement of jurisdiction.

STATEMENT OF THE CASE

Respondent generally accepts Petitioner's statement of the case for the purposes of this petition. However, Respondent believes that in order to fully analyze Petitioner's allegation of error in the instruction on intent to kill, it is necessary to examine a slightly larger portion of the instructions than is reproduced in the petition. State court trial transcript, pages 307-309:

"Now what I propose to do for you now is to define in the first count, first degree murder. The included offense of second degree murder and manslaughter.

"And for the second count, possession of a firearm in the commission of a felony.

"Then I will define more specifically for you what is required in order to find aiding and abetting.

"All right, the statutes of the State of Michigan insofar as they are applicable to this case provide with respect to first degree murder as follows:

"All murder which shall be perpetrated by wilful, deliberate or premeditated killing shall be murder in the first degree.

"To establish this charge *you will first be instructed on murder in the second degree* because murder in the first degree and murder in the second degree are related offenses.

"*I am going to define murder in the second degree and then murder in the first degree* for you.

"The Prosecution must establish each of the following elements beyond a reasonable doubt.

"First, that the deceased, Charles Thompson, died on or about August 17, 1977, within the City of Detroit.

"Second, that his death was caused by an act of the principal alleged here, that is to say, Clarence Pippin and that the deceased, Mr. Thompson, died as a result of this act.

"Third, if you find that the act was so caused, you must determine whether Mr. Pippin was guilty of any crime. The killing of a human being by another may be entirely innocent. It is not the act of killing in itself which makes it a crime but the state of mind with which it is done.

"A killing is not murder if it is justified, excused or mitigated.

"Fourth, for murder, you must indicate that the principal acted wilfully, consciously and knowingly in performing the act which caused death. The principal must

have either intended to kill, that is, he must have done the act intending that it result in death or in great and serious bodily injury or he must have knowingly created a very high degree of risk with the knowledge that it probably would cause death.

"For murder in the first degree, the Prosecutor must prove the four elements of second degree murder which I have just gone through with you and in addition he must prove beyond a reasonable doubt that the fifth element which raises the crime to first degree murder, and the fifth element is as follows, that the death was the result of a premeditated, deliberate intent to kill.

"Now, what do we mean by premeditation? Premeditated means that the person thought about the act beforehand or designed or planned the act. That is, that he contemplated the act and that it was done—not done—excuse me, on the spur of the moment.

"Wilful means intentional." (Emphasis added).

REASONS FOR DENYING THE WRIT

Because The State Court Jury Instructions Accurately Defined The Element Of Intent To Kill Under State Law And Did Not Relieve The Prosecution Of The Burden Of Proving Each Element Beyond A Reasonable Doubt, This Case Presents No Issue Requiring Review By This Court.

Examination of the state court's instructions reveals that the judge instructed the jury on the elements comprising murder in the second degree and then went on to define the additional element necessary for a conviction of murder in the first degree. Petitioner's challenge to the instructions relates only to language found in the definitions of second

degree murder and he carefully ignores the language specifically defining the element of "a premeditated, deliberate intent to kill" necessary for first degree murder.

It is undisputed that under Michigan law first degree murder requires a specific intention to take life. *People* v *Garcia*, 398 Mich 250 (1976). It is also true, however, that under the common law definitions of second degree murder, the requirement of malice aforethought may be satisfied by several types of mental elements: specific intent to kill; intent to do serious bodily injury; and wanton and wilful disregard that the natural tendency of behavior is to cause death or great bodily harm. See *People* v *Aaron*, 409 Mich 672, 713-715 (1980).

In the instant case the state court judge correctly instructed the jury on the elements of second degree murder, including the mental element of malice aforethought:

> "The principal must have either intended to kill, that is he must have done the act intending that it result in death or in great and serious bodily injury or he must have knowingly created a very high degree of risk with the knowledge that it probably would cause death."

Although Petitioner objects to that definition with respect to his conviction of *first degree murder*, it is apparent that the trial court was then referring only to the elements of *second degree murder* since the instructions immediately continued as follows:

> "For murder in the first degree, *the prosecutor must prove* the four elements of second degree murder which I have just gone through with you and *in addition* he must prove beyond a reasonable doubt that the fifth element which raises the crime to first degree murder,

and the fifth element is as follows, *that the death was the result of a premeditated, deliberate intent to kill.*" (Emphasis added).

When the challenged instruction is properly viewed in context rather than in "artificial isolation", see *Cupp* v *Naughten*, 414 US 141 (1973), it is readily apparent that the jury was correctly instructed on the separate elements of the offenses under state law, including the requirement that for a conviction of first degree murder, the prosecution must prove beyond a reasonable doubt the specific intent to kill.

CONCLUSION AND RELIEF SOUGHT

Because the state court jury was correctly instructed on the elements of first degree murder and the prosecution was not relieved of its burden of proving each element beyond a reasonable doubt, it is apparent that Petitioner's constitutional rights were not violated.

For the foregoing reasons, Respondent urges this Court to deny the Petition for Certiorari.

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